No. 52.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. [illegible] 52

JOHN ROMIG and DANIEL W. HARDING,
APPELLANTS,

v.

MYRTLE GILLETT,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF ON BEHALF OF APPELLANTS.

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Counsel for Appellants.
Attorney for Appellants

Supreme Court of the United States.

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APPELLANTS,

vs.

MYRTLE GILLETT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF ON BEHALF OF APPELLANTS.

FACTS.

1. On February 2, 1895, Don A. Gillett made and delivered to the appellant John Romig his certain promissory note for the sum of $700, interest and costs, and therein waived presentation for payment, notice and protest, and notice of non-payment, as well diligence in attempting to collect same (*R., 14*).

The payment of said note was secured by mortgage, bearing even date with said note (and duly recorded on the same

date), from said Gillett to Romig, upon certain real estate (described in the record), the same then being *unimproved* prairie land in Oklahoma Territory (*R., 11, 12, 13, 49*).

The mortgage contained the usual provision that upon any default in payment of principal or interest, &c., the mortgagee "shall be entitled to the possession of said mortgaged premises" (*R., 13*).

2. It seems that thereafter, February 6, 1895 (as subsequently appeared in this case), Gillett sold and conveyed said real estate to Myrtle A. Gillett, appellee herein (*R., 52*).

3. Thereafter, March 11, 1896, default in payment having occurred and the conditions of the mortgage having been thus broken, suit in foreclosure was instituted by the mortgagee Romig against Don A. and Myrtle Gillett, it being therein alleged, *inter alia*, that said Myrtle Gillett had or claimed some junior interest or lien upon said real estate, and it was prayed that said mortgage be foreclosed and the real estate sold, and that all interest, estate, and equity of redemption, if any, of said defendants be forever barred and foreclosed (*R, 10–12*).

4. Summons duly issued under said petition in foreclosure March 12, 1896 (*R., 14*), and was thereafter duly returned *non est* as to each defendant (*R., 15*). Thereupon an affidavit was filed in pursuance of the statute in that behalf for the purpose of proceeding against said defendants by *publication* (*R., 15, 16*), and which notice was given, published, and proof thereof filed, as required by law (*R., 17, 18*).

5. Thereafter, on December 18, 1896, judgment in foreclosure was entered against said defendants and sale of said real estate ordered, in the event of failure to pay the amount of the indebtedness and costs, as therein adjudged and decreed (*R., 18–20*). Order of sale thereunder issued January

20, 1897, said real estate was duly appraised, notice of said sale was given and published and proof thereof filed, as required by law, and the real estate was sold to said Romig, he being the highest bidder, and return thereof was duly made to the court (*R., 20–24*).

The sale was thereafter *confirmed* by the court March 1, 1897, and an order issued directing the sheriff to make conveyance unto Romig and to put him into possession of the property (*R., 26*), which conveyance was made accordingly and Romig put into possession March 9, 1897 (*R., 27–29*).

It is thus seen that, so far as disclosed by the records of the court in which said proceedings were had, the title to and possession of the property in controversy became vested in Romig March 9, 1897.

6. On that date Daniel W. Harding (party appellant herein), having first had the several orders and decrees of court aforesaid examined by an attorney employed by him in that behalf, and being by him informed and believing that the same were regular and in compliance with law, became in good faith the purchaser of said property for a valuable consideration (*R., 49*), received deed therefor from Romig, dated as aforesaid and recorded March 10, 1897 (*R., 37, 38*), and he thereupon entered into possession of the property (*R., 49*).

At the time of his said purchase the property consisted of unimproved prairie lands. Thereafter he erected three residences thereon, as well made various permanent and valuable improvements thereon, of the value of $2,000, paid taxes upon the property to the amount of $200, and has ever since resided thereon (*R., 46, 49*), the property being now reasonably worth the sum of $5,500 (*R., 2, 3*).

7. Some *fourteen months thereafter*, and on May 11, 1898, the appellee Gillett filed motion to vacate and set aside

said judgment in foreclosure, as well all the proceedings had thereunder, alleging in support of the motion that the attempted service by publication was irregular and void; that the affidavit upon which the same was based was insufficient in law, and that during all the times mentioned she had been, in fact, a resident of said Territory (*R.*, *29*, *30*).

In support of said motion, appellee filed her own affidavit, confining the same, however, to the single question of *her* presence and residence in the Territory, not offering any answer or defense whatever to the merits of said foreclosure suit or making any tender to pay the mortgage indebtedness (*R.*, *31*), and also filed in support of said motion the affidavit of one Guy R. Gillett, stating that of his own knowledge the said Don A. Gillett was a *non-resident* of said county and Territory from the time of the institution of the suit until after March 1, 1897 (*R.*, *31*, *32*).

8. The single issue of presence and residence thus raised was heard and determined by the court upon affidavits, and on April 15, 1899, decree was entered setting aside and vacating said judgment in foreclosure and all proceedings had thereunder, but reserving the question of the right of possession and restitution (*R.*, *40*, *41*).

On June 21, 1899, the matter came on for further and final consideration, and it was thereupon decreed that said Romig and said Harding, as his grantee, *forthwith* quit and surrender the full possession of the property to said Gillett, and in the event of their failure that the sheriff remove them therefrom and put the said Gillett in possession (*R.*, *44*, *45*).

9. On June 30, 1900, said decree was *affirmed* by the supreme court of the Territory (*R.*, *53*, *54*).

10. Thereupon the case was brought to this court on appeal, with *supersedeas* (*R.*, *62*).

The foregoing statement indicates substantially the *facts* in the case, as well also the proceedings had therein. Without here repeating the same, the attention of the court is particularly asked to the following pleadings and proceedings, which are deemed to have an important and controlling bearing upon the questions raised by this appeal:

1. The affidavit of plaintiff's attorney, and upon which publication was made, contained a full statement of the filing of suit, of the cause of action, and relief therein sought; also a statement that summons in said cause had issued for said defendants and had been returned "not to be found," etc.; that the action was brought for the sale of said real estate under said mortgage, and added:

(*a*.) "Affiant further says that he is unable and that the plaintiff is unable, by using due diligence, to obtain service of summons on the said defendants within the Territory of Oklahoma."

* * * * * *

(*b*.) "Affiant further states, upon information and belief, that the said defendants * * * * are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants * * * within the said Territory," etc., (*R., 15, 16*).

(NOTE.—The attack made by appellee Gillett, and sustained by the lower courts, seems to be based solely upon the alleged insufficiency, under the laws of Oklahoma, of the foregoing affidavit for publication in respect of the paragraph thereof above designated as (*b*). It seems to be conceded that all proceedings thereafter had were *otherwise* regular and in compliance with law.)

2. After the proceedings had in said cause, resulting in a sale of said property, hereinbefore referred to, said sale was,

by the court, *confirmed*, the order of confirmation reciting, *inter alia*, the following:

"And the court having carefully examined the proceedings of said sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided. It is ordered and adjudged by the court that said sale and the proceedings be, and the same are hereby, in all respects, confirmed; and the clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale; and the said sheriff is ordered to execute to said John Romig, the said purchaser at said sale, a good and sufficient deed for said lands and tenements, so sold, to wit," etc. (*R.*, *26*).

3. As hereinabove stated, the *motion* of appellee Gillett to set aside and vacate said judgment in foreclosure and all proceedings had thereunder was based solely upon an allegation of the insufficiency in law of the affidavit of publication; it made no allegation or tender of any defense to the merits of the action, nor any tender to pay the mortgage indebtedness (*R.*, *29–32*).

4. The motion and accompanying affidavits of appellee were met and replied to by the affidavits of appellants (*R.*, *32*, *35*, *49*), and in various forms appellants objected and protested against the relief sought by appellee, as well the attempted ouster of appellants in summary manner and without due process of law, but without avail (*R.*, *33–38*, *41–43*, *45–50*, *59–62*).

5. As will be hereinafter shown, both the trial court and the supreme court of the Territory decided this case solely upon the alleged insufficiency of the affidavit of publication, and entirely ignored the rights of the appellant Harding as a *bona fide* purchaser for value under the proceedings in foreclosure and sale made thereunder (*R.*, *40*, *41*, *43–45*, *51*, *53*, *54*, *61*, *62*), as well also ignored the express provisions of

the statute laws of Oklahoma in that behalf made and provided (*infra*).

STATUTES OF OKLAHOMA.

Before passing to the consideration of the questions here involved, the statutes of Oklahoma, so far as here applicable according to the contentions of either side herein, may be usefully referred to.

(The references below given are to sections of chapter 66 of the code, set forth in the Statutes of Oklahoma, 1893:)

§ *10* (3884) abolishes the distinction between actions at law and in equity, and designates all as civil actions.

§ *46* (3920):

"Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section forty-seven:

* * * * * * *

"*Third.* For the sale of real property under a mortgage, lien, or other incumbrance or charge."

§ *47* (3921) provides for the venue of such actions where the real property involved is situate in two or more counties, etc. (not material in this case).

§ *72* (3950):

"Service may be made by publication in either of the following cases: In actions brought under the 46th and 47th sections of this code where any or all the defendants reside out of the Territory, or where the plaintiff with due diligence is unable to make service of summons upon such defendant or defendants within the Territory; in actions brought to establish or set aside a will, where any or all of the defendants reside out of the Territory; in actions to obtain a divorce where the defendant resides out of the Territory; in actions brought against a non-resident of the Territory, or a foreign corporation, having in this Territory

property or debts owing them, sought to be taken by any of the provisional remedies, or to be appropriated in any way; in actions which relate to, or the subject of which is, real or personal property in this Territory, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the Territory or a foreign corporation; and in all actions where the defendant, being a resident of this Territory, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with the like intent."

§ *73* (3951):

"Before service can be made by publication, an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the *party* may proceed to make service by publication."

§ *74* (3952) provides, in detail, how the publication shall be made, and what it shall contain.

§ *75* (3953):

"Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer."

§ *77* (3955):

"A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the

petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section."

§ *482* (4360):

"If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such cases, restitution shall be made, by the judgment creditors, of the money, for which such lands or tenements were sold, with lawful interest from the day of sale."

§ *586* (4464) states the different causes for which judgments or orders may be vacated.

§ *587* (4465) states that the proceedings to vacate shall be by motion, upon notice, etc.

§ *590* (4468):

"A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action on which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment."

§ *593* (4471):

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five, and seven, of section five hundred and eighty-six, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or person of unsound mind, and then within two years after the removal of such disability. Proceedings for

the causes mentioned in subdivisions three and six, of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

§ *620* (4498):

"In all cases, any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or in equity * * * or being in quiet possession of and holding the same by deed * * * from and under any person claiming title, as aforesaid, * * * or being in quiet possession of and holding the same under sale on execution or order of sale against any person claiming title, as aforesaid, * * * or any person in quiet possession of any land claiming title thereto, and holding the same under sale and conveyance made * * * in pursuance of any order of court or decree in chancery where lands are or have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his or their part, shall not be evicted or thrown out of possession by any person or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his heir or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same previous to receiving actual notice by the commencement of suit of such adverse claim by which eviction may be effected."

§§ *622* (4500) to *631* (4509), inclusive, provide, in detail, the procedure to be followed in the cases embraced in said § *620*, which procedure includes the impanelling of a jury to assess the amount of purchase-money, value of lasting improvements, value of the use, rents and profits, injury, etc.; and, further, that such occupying claimant shall not be dispossessed until he receive from such adverse claimant such amount, if any, as may be found in his favor under the inquiry and assessment herein referred to.

ASSIGNMENT OF ERRORS.

The *errors* alleged and relied upon are set forth at length in the printed record (*R.*, *5*, *6*,) and will not therefore be here restated. The same involve substantially a consideration of the action of the lower court in respect of—

(*a.*) The sufficiency in law of the affidavit for publication.

(*b.*) The vacating and setting aside of the judgment in foreclosure, and all proceedings had thereunder upon the filing of a mere motion, unaccompanied by the assertion of any defense to the merits of the action or any tender of the mortgage indebtedness.

(*c.*) The setting aside and vacating the title of appellant Harding, notwithstanding the express statutory provision that a title acquired by a purchaser in good faith, under or in consequence of a judgment thereafter vacated or opened, shall not thereby be defeated or affected; and

(*d.*) The attempted ouster, without due process of law, of a *bona fide* purchaser, for value, under and in consequence of said judgment and sale in foreclosure, without reimbursement for purchase-money or for amounts expended by him in good faith and without notice for improvements upon the property.

These questions will be considered in the order stated.

I.

THE AFFIDAVIT FOR PUBLICATION WAS SUFFICIENT AND COMPLIED WITH THE REQUIREMENTS OF THE STATUTES OF OKLAHOMA.

As above shown, the statutes of Oklahoma (§ *72*, *supra*), so far as the present case is concerned, it being an action for the sale of real property under a mortgage (§ *46*, subdivision third, *supra*), provide, *inter alia*, for *two* grounds, upon either

one of which, affidavit having been filed, service by publication may be made:

(*a.*) "Where any or all of the defendants reside out of the Territory."

(*b.*) "*Or*, where the plaintiff *with due diligence* is unable to make service of summons upon such defendant or defendants within the Territory."

Either one of said two grounds was sufficient. Plaintiff's affidavit was in literal compliance with the above ground (*b*) and stated:

"Affiant further says that he is unable and that the plaintiff is unable *by using due diligence* to obtain service of summons on the said defendants within the Territory of Oklahoma" (*R., 16*).

The form of statement of this ground in the affidavit seems to be unobjectionable, and is apparently not attacked. The objection raised is that plaintiff instead of resting the affidavit upon the one ground added a second, as follows:

"Affiant further states *upon information and belief* that the said defendants * * * are non-residents of the Territory of Oklahoma, and that service of summons cannot be made on the said defendants, * * * within the said Territory," etc. (*R., 16*).

The statement of said second ground, *upon information and belief*, is objected to, and by the lower courts held *insufficient* in law (*R., 58*).

General Requirements in Respect of Affidavits for Publication.

Before considering specifically the affidavit under review in this case, a few principles having general application to affidavits for publication may be usefully referred to.

It is frequently stated, both in decisions and text-books, that, service by publication being purely statutory, the statu-

tory requirements must be complied with. While this is true, yet where there has been a substantial compliance with the statute, particularly in cases of foreclosure of mortgages and sales made thereunder to innocent purchasers, the court will not and should not thereafter set aside and annul the proceedings had thereunder upon an unnecessarily strict construction of either the statute or affidavit. Raymond v. Ries 49 Pac 1111

For example, an order, otherwise valid, will not be vitiated because of surplusage (Cruzen *vs.* Stephens, *123 Mo., 337;* Burnes *vs.* Burnes, *61 Mo. App., 612*), nor for immaterial defects and omissions (Webster *vs.* Daniel, *47 Ark., 131;* College *vs.* Pickens, *42 S. Cor., 511;* Foster *vs.* Givens, *67 F. R., 684;* Williams *vs.* Hudson, *93 Mo., 524;* Hansford *vs.* Hansford, *34 Mo. App., 262;* *In re* James, *99 Cal., 374*).

In the majority of cases wherein judgments obtained under service by publication were subsequently set aside the record disclosed either that the affidavit was *wholly* bad or that there was a fatal omission of some *material* requirement of the statute either as to the affidavit or the publication (*e. g.*, Hafern *vs.* Davis, *10 Wis., 443;* Beach *vs.* Beach, *43 N. W., 701;* Shields *vs.* Miller, *9 Kas., 266;* Harris *vs.* Claflin, *36 id., 543;* Grouch *vs.* Martin, *47 id., 313;* Brisbane *vs.* Peabody, *3 How. Pr., 109;* Hallett *vs.* Righters, *13 id., 43*).

It is important to bear in mind that probably a majority of the reported cases in which judgments obtained under service by publication have been subsequently set aside, either as voidable or void, because of an insufficient affidavit, involve two classes of cases: one, actions of *divorce*, where, for reasons of public policy and the welfare of society, the greatest strictness is required; and, the other, where *fraud* is alleged. This will account for the apparent lack of harmony in the decisions, and a reading of the decisions will also indicate that they are controlled largely by the merits involved in the particular case. So that, at last, each case turns upon its own facts, rather than upon any uniform rule of decision.

Again, service by publication being purely statutory, the decisions are necessarily based upon the statutes of the particular State in which the case arises; and as those statutes differ in many essential and material particulars, decisions, apparently in conflict, may in many instances be reconciled by referring to the particular statute involved.

Thus, in some of the States, upon the filing of an affidavit containing a statement of the *ultimate* facts, in the language of the statute, the publication notice issues by the clerk of the court; in others, the sufficiency of the affidavit having been first passed upon by the court, the latter itself issues the order and publication notice.

This difference in statutory procedure has given rise to a difference in the decisions, it being held that where the *clerk* of the court is the officer to receive the affidavit and issue the notice of publication—his duty not being judicial—*probative* facts need *not* be recited, and that it is sufficient if the affidavit set forth the *ultimate* facts; but where the *court* itself is required to pass the order of publication the affidavit for publication should contain a recital of the *probative* facts by which the ultimate facts are established, so that the court may pass upon the sufficiency thereof.

This distinction is clearly stated in the opinion of the court in Ervin *vs.* Milne (*43 Pac., 706*), where, under a statute of Montana, the notice of publication was issued, not by the court, but by the *clerk*. The court, in considering an affidavit reciting merely the *ultimate* facts (as to due diligence, etc.), held it to be sufficient:

> "If it set forth substantially, in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons."

The opinion there points out the reason for the different rule of decision followed in the earlier cases in that State (Alderson *vs.* Marshall, *7 Mont., 288;* Palmer *vs.* McMaster, *8 Mont., 186*), the same having been decided under an earlier

statute which required the order of publication to be issued by the *court* (in force prior to 1887).

From an examination of the authorities it will be found that it has been repeatedly held that in affidavits for publication the *affirmative* statement of the ground upon which it is based is sufficient, and it is not necessary, for example, in stating that *due diligence* has been used, to state the facts and circumstances establishing the *kind of diligence* used (Bank *vs.* Eldred, *20 Wis., 207;* Young *vs.* Schenk, *22 id., 530;* Sueterlee *vs.* Sir, 25 *id.*, 357; Ervin *vs.* Milne, *43 Pac., 706;* Van Wyke *vs.* Hardy, *20 How. Pr., 222, etc.*).

And in Washburn *vs.* Buchanan (*34 Pac., 1049*, Kansas, 1893) the court sustained an affidavit containing the recital that "defendants were non-residents of this State, and service could not be had upon them within the State," even though the same omitted to add the words "due diligence," which were required by the statute then in force (Statutes of Kansas, 1889). Under the earlier statutes (1868) the clause relating to "due diligence" did not appear.

The Affidavit for Publication in the Present Case.

Having thus briefly alluded to a few of the principles having general application to affidavits for publication, attention is now asked to the particular affidavit here under review.

1. The *first* ground alleged in the affidavit (*b, supra*), namely:

"Affiant says that he is unable and that the plaintiff is unable by *using due diligence* to obtain service of summons on the said defendants within the Territory of Oklahoma" (*R., 16*)—

was and is in exact, strict, and literal compliance with the requirements of the statute (§§ *72* and *73*, and ground *b*, *supra*).

This averment, it will be observed, is positive and in the affirmative, and is therefore not subject to the criticism

made in respect of the further and other ground for publication contained in the affidavit, and which will be presently referred to.

The affidavit in this case was made by plaintiff's attorney, which, under said §§ *72* and *73* (*supra*), was in compliance with law (Banta *vs.* Wood, *32 Ia., 469;* Palmer *vs.* McCormick, *30 F. R., 82;* Bird *vs.* Mfg. Co., *45 id., 458;* Bank *vs.* Eldred, *20 Wis., 207*, and Storm *vs.* Adams, *56 id., 137*).

As has been above shown, under the laws of Oklahoma an affidavit for publication may be filed in the cases and of the character above referred to, and thereupon the *party* may proceed to make service by publication in the manner pointed out in the statute (§§ *72*, *73*, *74*, and *75*, *supra*).

In other words, the *party* having brought himself within the provisions of the statute, the publication notice issues by the clerk of court, and an order of publication by the court is *not* required (§ *73*, *supra;* also *R., 17*).

The authorities above cited establish that in such case *probative* facts need *not* be recited, and that it is sufficient if the affidavit set forth the *ultimate* facts.

That the present affidavit does set forth such *ultimate* facts in the exact language of the statute, in the affirmative and in positive terms of averment, in respect of the ground above referred to as (*b*), cannot be questioned.

Under the authorities, the proper statement in an affidavit of one statutory ground for publication is sufficient.

Thus, in Decorvet *vs.* Dolan (*35 Pac., 72*, Washington, 1893) the statute involved was one requiring the *clerk* to issue the notice of publication, and the affidavit there under consideration contained a recital that "defendants are non-residents," although it did not allege the use of due diligence. The court held said statement of fact to be sufficient, and held, further, that if *any* ground in the statute is alleged, it is sufficient, even though *all* of such grounds are not alleged.

Here one statutory ground was properly stated in the

affidavit, and was sufficient to support the service by publication (Decorvet *vs.* Dolan, *supra*), and the other ground therein stated, even if defective (which is not admitted), could have been rejected as unnecessary without vitiating the service (Sueterlee *vs.* Sir, *25 Wis., 357*).

It has been above pointed out that, under the statutes of Oklahoma, the *party*, having filed affidavit for publication, proceeds to make the publication, and the publication notice issues by the *clerk of the court*, and *not by the court* itself, and hence, under the authorities, the statement of the *ultimate* facts which bring the case within the requirements of the statute is sufficient, and that, therefore, the affidavit of publication in the present case, as to ground (*b*) thereof, *supra*, complied literally with the statute (§§ *72* and *73*, *supra*), and was sufficient, in law, to support the publication.

2. Passing now to the *second* ground alleged in the affidavit (*a*, *supra*), namely, "*upon information and belief*, that the said defendants * * * are non-residents of the Territory," etc. (*R., 16*).

This statement the court below characterized as a "mere hearsay declaration of counsel for the plaintiff," and it added that it "does not amount to legal proof" (*R., 58*).

In support of such holding, the court below cited but one case (*R., 58*), that of Hafern *vs.* Davis (*10 Wis., 443*), the facts in which, as well the character of the action there involved, were entirely different from the case here under review; and, moreover, the decision in that case was not based upon such holding, nor was any such supposed holding therein followed by the Wisconsin court in later decisions, as will below be shown.

In most jurisdictions it is held that the mere fact that some of the averments of an affidavit for publication are

made *on information and belief* will *not* render the affidavit insufficient.

Malaer *vs.* Damron (*31 Ill. App., 572*).
Dietrich *vs.* Lang (*11 Kan., 637*).
Colton *vs.* Ruppert (*60 Mich., 318*).
Walter *vs.* Degraaf (*19 Abb. N. Cas., 406*).
Chase *vs.* Lawson (*36 Hun., 221*).
Van Wyke *vs.* Hardy (*11 Abb. Pr., 473*).

In the last case (Van Wyke *vs.* Hardy) the affiant stated that after due and diligent search and inquiry the defendants could not be found in the State of New York, "*as he is informed and verily believes.*" This was held sufficient.

As above stated, the court below in the case at bar based its decision, so far as this branch of the case is concerned, upon the supposed authority of Hafern *vs.* Davis (*10 Wis., 443*).

That case was an action for damages for breach of promise of marriage. Under the Code of Wisconsin then in force (§ 40), the order for publication was required to be made by the court or a judge thereof. An affidavit for publication had been filed, publication made, and thereafter judgment by default entered, and damages assessed against the defendant. In reviewing said judgment, the court stated:

"This affidavit does not state a case falling within either subdivision of section 40 of the code. It is so totally defective that it is difficult to say under which subdivision the pleader intended to proceed."

The court then pointed out various fatal omissions, and then added:

"The affidavit is in other respects irregular. Most of the statements are upon information and belief. Such statements are but hearsay, and not evidence of fact * * * We do not wish to be understood as deciding that in no case can such statements be received."

It will be noted that even here the Wisconsin court was careful to limit and confine its criticism of statements made "upon information and belief" in affidavits for publication to the particular case there before it, expressly reserving to itself the right to hold otherwise in other cases.

It is thus seen that the judgment in that case was held void, not because of the alleged *irregularity* referred to in the last paragraph, just quoted, but because the affidavit stated *no* statutory ground for the publication.

This is made perfectly clear in the later case of Storm *vs.* Adams (*56 Wis., 137*). There the affidavit for publication and under review by the court had been made by plaintiff's attorney, and was "*upon information and belief.*" It was there urged that it was insufficient, and the case of Hafern *vs.* Davis (*supra*) was relied upon in support of the contention.

The court, however, sustained the affidavit, and in its opinion pointed out that the affidavit in the Hafern-Davis case stated *no* statutory ground for the publication, and that for that reason *alone* the judgment therein had been held void. It also observed that the opinion in said former case had further commented on the affidavit under review in that case as having been in *other* respects *irregular*, because made upon information; but as to this it states:

"But the judgment was not held void for this irregularity, but because the affidavit stated *no* statutory ground for the publication."

So, too, in the case of Bank *vs.* Eldred (*20 Wis., 207*), which was an action to foreclose a mortgage on real property, an affidavit had been filed by plaintiff's attorney wherein, after reciting the cause of action, relief sought, etc., it was stated:

"That said defendants cannot, after due diligence, be found in this State; that, as affiant is *informed and believes*, said defendants are not residents of this State," etc.

(That affidavit, it will be observed, is in language substantially similar to the one at bar, *R.*, *16*.)

There the court was asked to hold the affidavit insufficient under the authority, among others, of the Hafern-Davis case, *supra*, but the court declined to so hold, and sustained the sufficiency of the affidavit.

And, again, in the case of Young *vs.* Schenk (*22 Wis.*, *530*) the affidavit stated:

"That the defendant * * * is a non-resident of the State of Wisconsin, and cannot, after due diligence, be found therein."

The affidavit then added that affiant—

"is *informed and believes* that the said defendant * * * is a resident of the State of New York," etc.

That affidavit was likewise held sufficient.

Without further citation it is clear that the only authority relied upon by the lower court to sustain its holding in this regard—namely, the Hafern-Davis case—does not, in fact, sustain it, and, moreover, if it did that case was overruled in the later Wisconsin cases, just referred to.

It does not appear that there is any rule of decision in Oklahoma in respect of the sections of the statutes here under review.

3. In this connection it should be borne in mind that the defendant Don A. Gillett, the mortgagor, was, in fact, a *non-resident* of the Territory during all times from the institution of the suit until after the judgment and sale in foreclosure (*R.*, *31*, *32*), so that, as to the *mortgagor*, no question whatever can arise in this case.

From all of the foregoing, it is submitted that the affidavit for publication was *sufficient* and was in compliance with the requirements of law; that the judgment and sale in fore-

closure based thereon were regular and valid, and that the court below *erred* in holding the same irregular and void.

II.

THE COURT ERRED IN VACATING AND SETTING ASIDE THE JUDGMENT IN FORECLOSURE AND ALL PROCEEDINGS HAD THEREUNDER UPON THE FILING OF A MERE MOTION, UNACCOMPANIED BY THE ASSERTION OF ANY DEFENSE TO THE MERITS OF THE ACTION, OR ANY TENDER OF THE MORTGAGE INDEBTEDNESS.

As above shown, the affidavit for publication in this case was *sufficient*, and therefore the court below was not warranted in setting aside and vacating the judgment in foreclosure and the proceedings had thereunder.

The statutes of Oklahoma, as above shown, contain various provisions in respect of vacating judgments.

For example, § *77* (3955) provides that a party proceeded against by publication may at any time within three years from the rendition of judgment have the same opened and be let in to defend. Before such judgment can be opened, however, the applicant is required to give notice, also to file a full answer to the petition, pay all costs, if required by the court, and, further, shall make it appear by affidavit that during the pendency of the action no actual notice thereof was had to appear in court and make defense.

§ *590* (4468) provides that a judgment shall *not* be vacated on motion or petition *until* it is adjudged that there is a valid defense to the action on which the judgment is rendered.

§ *593* (4471) fixes the periods within which the judgments therein enumerated may respectively be vacated. It concludes by providing that a *void* judgment may be vacated *at any time* on motion, etc. (*Note.*—So far as said § *593* may be claimed to confer jurisdiction to vacate a void judgment upon motion, it must be read in connection with said § *590*,

supra, which provides generally that a judgment shall *not* be vacated on motion until it is adjudged that there is a valid defense to the action in which the judgment was rendered.)

A mere reading of said sections (and which have been hereinbefore quoted in full), taken in connection with the facts in the present case, will show that the appellee failed utterly to bring herself within either or any of the provisions of law in respect of vacating the judgment in this case.

She did not tender or file a full, or any, answer to the petition in the case, nor did she allege, nor was it adjudged, that there was any defense, valid or otherwise, to the action on which the judgment was rendered; a mere *motion* was presented, asking that the judgment be vacated, in support of which two affidavits were filed, one alleging that at all times covered by the suit the defendant, Don A. Gillett, the mortgagor, was *absent* from the Territory (*R., 31, 32*), and the other, her own affidavit, stating that she was present within the Territory of Oklahoma during the time of the proceedings, was well known to a large number of persons in the county; that she had no knowledge of the institution or prosecution of the case "*until long after date of sale of land*," and that she had no actual notice of the institution and pendency of the action (*R., 31*).

It is a significant fact that appellee thus carefully avoided stating *when* she did acquire such knowledge or notice.

The fact remains, however, that it was not until some *fourteen months* after Harding had acquired title to the property, and during which time he had expended large sums of money in improving it and erecting buildings and a residence thereon, that she, for the first time, attacked the regularity of the proceedings under which he acquired title.

Notwithstanding the fact that the judgment was admittedly valid, regular, and binding against the defendant mortgagor (from whom appellee acquired title *subsequent and*

subject to the mortgage in suit), appellee seems to have proceeded upon the theory that she could ignore every statutory provision made for the protection of persons acquiring title to property under the sanctity of judicial proceedings, but which are thereafter attacked, and that she could base her claim solely upon the supposed authority of § *593* (4471), *supra*, which, as has been seen, is merely a *statute of limitations*.

That section, having fixed the various periods of limitation within which judgments of the several classes therein specifically enumerated may be vacated or modified, concludes by adding that a *void* judgment may be vacated *at any time* on motion, etc.; in other words, that the statutory limitations therein prescribed shall have no application to *void* judgments.

This exception would seem to necessarily follow, even without statutory expression. But to say that that clause (just referred to) operates to authorize such a motion as was filed in this case, unaccompanied by any answer, or the assertion of any defense, valid or otherwise, to the merits of the action, or by any tender of the mortgage indebtedness, would be to absolutely ignore and hold of no effect the several express statutory provisions hereinbefore quoted and which were made to cover and protect just such rights of *bona fide* purchasers as are here involved.

It would be hard to conceive of a case more completely within and covered by the statutory provisions aforesaid, as well, also, within the protection and security of title and property therein intended to be afforded, than is the present.

Assuming for the sake of argument that appellee, upon a proper showing and upon compliance by her with the express statutory requirements, could have had said judgment in foreclosure opened, without, however, thereby affecting or defeating the title of appellant, Harding, it is perfectly manifest that she utterly failed to follow the requirements of the

statutes, and that, therefore, she was not entitled to the relief sought.

It is a familiar rule of law and decision that an application to open a judgment obtained by default made under a statute must substantially comply with all of its provisions (Durham *vs.* Moore, *48 Kans., 135*).

That the motion of appellee to set aside the judgment in foreclosure, as well all proceedings had thereunder, did not in the slightest respect comply with any or either of the provisions of said statutes is so self-evident as to hardly justify counsel in attempting any further argument in respect thereof.

It is respectfully submitted that the court below further *erred* in its holding in this regard.

III.

THE COURT ERRED IN VACATING THE TITLE OF APPELLANT HARDING, NOTWITHSTANDING THE EXPRESS STATUTORY PROVISIONS THAT THE TITLE OF A BONA FIDE PURCHASER, FOR VALUE, ACQUIRED UNDER OR IN CONSEQUENCE OF A JUDGMENT THEREAFTER OPENED OR VACATED, SHALL NOT THEREBY BE DEFEATED OR AFFECTED.

The court below by its decree undertook to summarily oust and dispossess appellants from possession of the property in controversy in utter disregard of the rights and claims of appellant Harding, who, as shown by the uncontradicted facts of record, was and is a *bona fide* purchaser for value under and by virtue of the foreclosure proceedings aforesaid, and upon the faith of which title he expended large sums of money.

As bearing upon the question of *good faith* and as showing the state of the judicial record upon which appellant Harding, at the time of his purchase, had a right to rely, the

attention of the court is particularly asked, *first*, to the judgment in foreclosure, wherein the court recited that:

"the said defendants, Don A. Gillett and Myrtle Gillett, come not, but make default, *although duly and legally served by publication*" (*R., 18*);

and, *second*, to the order and judgment of *confirmation* of sale, wherein it is recited:

"and the court having carefully examined the proceedings of said sheriff in making said sale, being satisfied that said sale has been made in all respects in conformity to law and the statutes in such cases made and provided * * * and the clerk of said court is hereby directed to make an entry on the journal that the court is satisfied with the legality of such sale" (*R., 26*).

The record also shows that, prior to his said purchase, appellant Harding employed an attorney to make examination as to the regularity of said foreclosure proceedings, and acting upon such report, and in the belief that said proceedings were in all respects regular and valid, he made purchase of the property, and for a period of about *fourteen months thereafter* continued in the quiet and peaceable possession thereof, exercising full and complete ownership, erecting buildings, residing thereon, etc., etc., without notice of any adverse claim made by or on behalf of any one whomsoever, until the filing of motion to set aside the judgment (*R., 35, 47–49*).

As above shown, § *77* (3955), which authorizes the opening of judgments obtained under service by publication, in the certain cases and under the conditions therein prescribed, expressly provides that such action *shall not affect* the title of a purchaser situate as is the appellant in this case.

In addition to that section, there is the further provision of § *482* (4460) which in express terms directs that if any judgment in satisfaction of which any lands or tenements are sold shall at any time thereafter be reversed, the reversal

shall not defeat or affect the title of such purchaser, and in such cases it is directed that restitution shall be made by the judgment creditors of the money, with interest, for which such lands or tenements were sold.

And, again, § *590* (4468) provides that, where a judgment is modified, all lands and securities obtained under it *shall be preserved* to the modified judgment.

The above quoted §§ *77* (3955), *482* (4460), and *590* (4468), if given the meaning properly attributable to the words used, expressly and in unmistakable terms *preserve* unimpaired to a *bona fide* purchaser, situated as is the appellant Harding in this case, the title, lien, and security which, *by or in consequence* of the judgment, passed to him, even where such judgment shall thereafter be opened, reversed, vacated, or modified.

If, therefore, said provisions of law have application to any case, they furnish protection to the appellant Harding in this case, whose position as a *bona fide* purchaser for value, under the supposed security afforded by judicial sale, is absolutely unassailed.

Thus in Howard *vs.* Entreken (*24 Kan., 428*) plaintiff had obtained title to the property under a judgment obtained upon service by publication; he thereafter sold the property to an innocent purchaser. The statute there involved was identical with § *77* (*supra*) of the Statutes of Oklahoma. The court there declined to permit the title of such innocent purchaser to be disturbed, and said:

"If the judgment is afterwards reversed, or opened up, the defendant who has lost his property must look to the plaintiff for redress.

* * * * * *

"If Entreken had purchased in good faith the property at a judicial sale, it must be conceded that his title would not have been divested by the reversal of the judgment. As he purchased the property upon the faith of a judicial

decree from the party plaintiff, for a valuable consideration, and in good faith, the like rule prevails."

See, also, Guiteau *vs.* Wisely (*47 Ill., 433*), and Taylor *vs.* Boyd (*3 Ohio, 338*).

The court below, as will be seen from its opinion (*R., 58, 59*), entirely ignored the rights and claims of appellant Harding, as a *bona fide* purchaser, and, having arrived at the erroneous conclusion that the judgment in foreclosure was void, disposed of Harding by the statement that every subsequent proceeding under the void judgment was equally void.

In support of that holding, the court below cited three cases decided in Kansas: Shields *vs.* Miller (*9 Kas., 390*), Harris *vs.* Claflin (*36 id., 543*), and Grouch *vs.* Martin (*47 id., 313*).

The cases of Shields *vs.* Miller and Harris *vs.* Claflin (*supra*) were actions in ejectment between the grantee of a mortgagor and a purchaser under foreclosure proceedings, and the court, having found that the affidavit for publication in the foreclosure proceedings and there under review was *wholly* bad because of a total omission to state the statutory prerequisites for publication, held that the judgment based thereon was void. It was not there claimed that the affidavit stated the statutory grounds defectively or insufficiently, but that it was *totally* bad in that it did not allege the statutory grounds.

In those two cases the court did apparently permit a recovery in said collateral action (ejectment), notwithstanding the fact that title was acquired by the purchasers under or in consequence of the sales in foreclosure, and notwithstanding the further fact that the judgments in foreclosure had never been directly attacked or set aside. Said two decisions are, however, in direct conflict with what seems to be the overwhelming weight of authority, as will presently be shown.

The other case so cited by the court below, Grouch *vs.* Martin (*supra*), is not here applicable. In that case judgment by default was obtained under service by publication, and, execution having issued thereunder and the lands of defendant levied upon, it was objected that the affidavit for publication was insufficient in entirely omitting a vital statutory requirement. The court sustained the objection, quashed the execution and levy, and reversed the judgment, but there the lands had not been sold, no rights of innocent purchasers had intervened, and the question was merely between the original parties to the action; hence that decision can have no useful bearing upon the determination of the present case.

To hold that the appellant Harding can be so summarily deprived of his money and property, without redress of any kind, is not only in direct conflict with the laws of Oklahoma, but is subversive of every legal and equitable consideration, even without the aid of statutory enactment.

This subject is treated of in Freeman on Judgments (*vol. 2, § 509*). The author there quotes at length from the case of Reeve *vs.* Kennedy (*43 Cal., 649*) as follows:

"No principle is better settled than that a purchaser at a judicial sale, without notice, under proceedings regular upon their face, and had in a court of competent jurisdiction, is not affected by any mere error of the court for which the judgment might be reversed upon appeal, nor for any secret vice in the judgment not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. He is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction to render the judgment, and whether there is a valid execution. But nothing more is required of him. * * * As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a *bona fide* purchaser without notice could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the

record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demand that a purchaser at a judicial sale without notice, under proceedings regular upon their face, and by a court of competent jurisdiction, should be protected as against mere errors of the court and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale if he incurred the hazard of losing his money in case it should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied as proving a service on the defendant was in fact false."

Again, in the case of Hammond *vs.* Davenport *et al.* (*16 Ohio St., 177, 183*), collateral attack was made in respect of certain proceedings in foreclosure, wherein service had been made by publication; and plaintiffs, in said collateral suit, asserted that they were, in fact, residents of the State at the time of the foreclosure proceedings and could have been served. In that State the right is given to any defendant proceeded against by publication to come in within five years thereafter, have such decree opened, and be let in to defend, upon the condition, however, that title to any property which by or in consequence of such decree shall have passed to a *bona fide* purchaser shall not be thereby affected. (This saving proviso, it will be observed, is similar to the provision in the Oklahoma Statutes, § *77, supra.*) The court referred to that section of the Ohio statutes and declined to permit the validity of the title acquired by the purchaser at such judicial sale to be disturbed.

See also to the same effect:

Hahn *vs.* Kelly (*34 Cal., 391*).
Ogden *vs.* Walters (*12 Kan., 282*).
Callan *vs.* Ellison (*13 Ohio St., 446*).
Payne *vs.* Lott (*90 Mo., 676*).
Jones *vs.* Driskell (*94 id., 190*).
Schmidt *vs.* Niemeyer (*100 id., 207*).

Further citation of authority would seem unnecessary.

Again, it is to be kept in mind that by the terms of the mortgage involved in the present case the mortgagee became entitled to the *possession* of the property upon breach of condition (*R., 13*), and which breach admittedly occurred.

It is also conceded that appellee took her conveyance *subject* to the payment of said mortgage (*R., 52*), and that by the sale in foreclosure the mortgage indebtedness was satisfied to the extent of the proceeds realized from such sale.

And yet appellee claims the absolute right of possession of the property thus freed of the mortgage incumbrance, as well also the right to deprive the innocent purchaser of all amounts expended by him, in entire good faith, both in the purchase of the property and in maintaining and improving it.

It is believed that no such inequitable doctrine has ever prevailed in any jurisdiction, either at common law or under statutory authority.

This question was considered by this court in the case of Evans *vs.* Pike (*118 U. S., 241, 248, 249*). In that case, a person having an interest in mortgaged premises sold under foreclosure, but who had not been made a party to such foreclosure proceedings, sought by petitory action (in the nature of an action of ejectment at common law) to dispossess the purchaser of said premises under said judicial sale, but without redeeming or offering to redeem the property by paying the mortgage debt.

This the court declined to permit. In the opinion, the court quotes from the case of Dufour *vs.* Camfranc (*11 Martin, 607, 615*):

"Nothing could be more unjust than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

It also quotes with approval the same rule of decision from the following cases:

Donaldson *vs.* Rouzan (*8 Martin, N. S., 162*).
Stockton *vs.* Downey (*6 La. Ann., 581*).
Taylor *vs.* Huey (*11 id., 614*).

The opinion proceeds (*p. 248*):

"In the English system, followed in most of the States, a person having an interest in mortgaged premises sold under a foreclosure, and not made a party to the proceedings, merely retains his equity of redemption, that is, a right to redeem the property by paying the amount due on the mortgage. He cannot turn the purchaser out of possession, without redeeming, or offering to redeem, the property by paying the mortgage debt. This rule is founded in such manifest justice that we should be surprised not to find it in some form in a system of law drawn from the same source as that of English equity. An examination of the Louisiana decisions shows that we are not mistaken in our anticipations."

And, again, in the case of Brobst *vs.* Brock (*10 Wall., 519, 534*), wherein a mortgage had been foreclosed and sale made thereunder and which judgment in foreclosure was irregular because neither the original mortgagor nor his grantee had been served with process, either actually or constructively. Action of ejectment was subsequently brought, in which it was alleged that said judgment was irregular and void. This court, however, held:

"An irregular or a void judicial sale, made at the instance of a mortgagee passes to the purchaser all the rights the mortgagee, as such, had. For this authority is hardly needed" (citing Gilbert *vs.* Cooley, *Walker's Chy., 494*; Jackson *vs.* Bowen *et al., 7 Cowen, 13*).

The cases of Bryan *vs.* Kales, Bryan *vs.* Brasius, and Bryan *vs.* Pinney (*162 U. S., 411, 415, and 419*) were actions of ejectment in which the mortgagor sought to recover against the

mortgagee in possession or against persons holding under such mortgagee, the right to recover being asserted upon the ground of an irregular or void judgment in foreclosure and sale thereunder. This court, however, declined to permit a recovery, and held:

"A mortgagor of land cannot recover in ejectment against the mortgagee in possession, after breach of condition, or against persons holding under the mortgagee.

"An irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes all the mortgagee's rights to the purchaser."

The present case obviously comes within the decisions above quoted. Here the mortgagee became entitled to the possession of the property upon breach of condition—condition was broken, the mortgage was foreclosed, and the property sold, and thus freed and discharged of said mortgage incumbrance. The appellee, occupying the position of subsequent grantee of the mortgagor and having acquired her title admittedly *subject* to the payment of the mortgage debt, comes into court and asks that she be restored to her ownership and possession of the property thus freed of said mortgage debt without the performance by her of any condition whatever, and she further asks that the innocent purchaser under the foreclosure proceedings shall be evicted as one having no rights or equities of any kind or character whatsoever.

It is submitted that the action of the court below in this regard was without authority of any kind, statutory or otherwise.

IV.

THE ATTEMPTED OUSTER, WITHOUT DUE PROCESS OF LAW, OF A BONA FIDE PURCHASER, FOR VALUE, UNDER SAID FORECLOSURE PROCEEDINGS, WITHOUT REIMBURSEMENT OF PURCHASE-MONEY, OR OF AMOUNTS EXPENDED, IN GOOD FAITH AND WITHOUT NOTICE, FOR IMPROVEMENTS, IS CONTRARY TO THE EXPRESS PROVISIONS OF THE STATUTES OF OKLAHOMA.

It is proper to here observe that the application made by the appellee was not in the exercise of any right of redemption, and indeed could not have been, since the right to redeem property after sale in foreclosure of a mortgage, wherever it exists, is *statutory* (Parker *vs.* Dacres, *130 U. S., 43*), and no such statutory right of redemption exists in Oklahoma (Payne *vs.* Long-John Lumber Co., *60 Pac., 235*).

While, as just stated, the present application was not in the assertion of any right to redeem, yet it is proper to note how carefully the courts have ever guarded the rights of innocent purchasers, even without statutory provisions in that behalf.

For example, it has been held that the right to reimbursement of a purchaser in good faith and for a valuable consideration who has made improvements upon the property can be supported upon general principles of equity, without regard to statutory provisions (Pryor *vs.* Boyd, *1 Story, 478*).

And, in like manner, a purchaser at a foreclosure sale who has made valuable improvements in the belief that he has a clear and absolute title is entitled to be paid for them, in case the premises are redeemed.

The authorities upon this subject are so exceedingly numerous that it is hardly deemed necessary to refer to them. The attention of the court is, however, asked to the case of Canal Bank *vs.* Hudson (*111 U. S., 66, 82*), and to Jones on

Mortgages (vol. 2), §§ 1128 and 1129, etc., wherein the various authorities are referred to.

Aside, however, from the principles of equity properly applicable to this question, namely, that the mortgagor can only be reinstated in the possession of property upon the condition of making reimbursement and compensation, the statutes of Oklahoma, §§ *620* (4498) to *632* (4510), known as the "Occupying claimant's act," furnish complete protection in respect of innocent purchasers claiming and holding title in good faith. These sections clearly show how carefully the Territory of Oklahoma has undertaken to safeguard and protect the property rights and interests of those whose titles are founded upon judicial proceedings and good faith.

The provisions of these sections are intended to be beneficial in application. They, in terms, expressly save and protect the rights of *bona fide* purchasers of property under judicial proceedings, an adverse and better title to which is subsequently set up by others, and it is therein provided that such innocent purchasers "*shall not be evicted or thrown out of possession*" until paid the full value of improvements made, etc. Said sections further provide just how such value shall be ascertained, assessed, and the payment thereof secured and enforced.

Hence it further appears that the decree in this case, undertaking to summarily eject the appellant Harding from said property without the slightest reimbursement of any kind whatsoever, was absolutely in defiance of the most explicit statutory provisions.

It is not denied that he was a *bona fide* purchaser for value, and that, without the slightest notice of any adverse claim, he was permitted to remain in quiet possession, and to expend several thousand dollars in improving the property and in establishing his residence thereon before any question was raised as to the validity of his title.

Similar statutory provisions have frequently been passed upon by the courts, and the constitutionality of such legislation upheld, and its provisions construed and applied in ac-

cordance with the manifest purpose of such statutes, namely, "to secure and give to each one, as near as may be, his own" (Henting *vs.* Redden, *1 Kan. App., 163*).

Without undertaking to here quote at length from the various cases in which similar statutes have received consideration by the courts, the attention of the court is asked to the following cases, wherein will also be found an extended citation of authorities:

Henting *vs.* Redden (*1 Kan. App., 163*);
Ditzler *vs.* Wilhite (*55 Kan., 200*);
Stephens *vs.* Ballou (*25 Kan., 618*);
Stebbins *vs.* Guthrie (*4 Kan., 353*);
Glick *vs.* Gregg (*19 Ohio, 57*), and
Beardsley *vs.* Chapman (*1 Ohio St., 119*).

In the case of Krause *vs.* Means (*12 Kan., 335*) the court, by Brewer, J., thus refers to the considerations having a proper bearing in connection with the case there under review (and which same considerations exist here):

"What equitable claim has the defendant in error (Means) upon these improvements? Her labor never put them there; her money never paid for them. Shall she take the fruits of his toil and money without compensation?"

Without further prolonging the discussion it would seem to result that under no conceivable theory was it proper or permissible to evict the appellant Harding without reimbursement or compensation.

V.

THE DECREE OF THE COURT BELOW WAS ERRONEOUS AND SHOULD BE REVERSED.

For all of the foregoing reasons it is respectfully submitted that the decree below was erroneous, and that the same should be reversed.

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